STATE OF MICHIGAN

IN THE

SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Cavanagh, P.J. and Fitzgerald, and Meter, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 127489

-vs-

JOSEPH ERIC DROHAN,

Defendant-Appellant.

Court of Appeals No. 249995
Oakland County CC No. 2002-187490-FH

APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

This Court entered an Order (28a) on March 31 2005, granting Defendant-Appellant's application for leave to appeal from a published opinion of October 12 2004, of the Court of Appeals. (Cavanagh, P.J., Fitzgerald, and Meter, JJ.). (20a-27a). *People v Drohan,* 264 Mich App 77; 693 NW2d 823 (2004). The Court of Appeals affirmed the jury verdict and judgment of sentence entered by the Honorable Deborah Tyner of the Oakland County Circuit Court on or about June 13, 2003. (18a-19a).

This Court, in its order granting the application, limited the issue to whether *Blakely v Washington*, 542 US _____; 124 S Ct 2531; 159 L Ed 2d 403 (2004) and *United States v Booker*, 543 US ____; 125 S Ct 738; 160 L Ed 2d 621 (2005) apply to Michigan's sentencing scheme.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL IS AFFECTED BY MICHIGAN'S INDETERMINATE SENTENCING SCHEME AND LEGISLATIVE GUIDELINES, BECAUSE NEITHER ALLOWS A DEFENDANT'S MAXIMUM SENTENCE TO BE RAISED ON THE BASIS OF JUDICIAL FACT FINDING?

Plaintiff-Appellee answers this question "No."

Defendant-Appellant contends the answer is "Yes."

The trial court did not answer this question.

The Court of Appeals answered this question "No."

A majority of this Court stated the answer should be "No".
[In *People v Claypool,* 470 Mich 715, 730 n14; 684 NW2d 278 (2004)]

COUNTER STATEMENT OF FACTS

Defendant, Joseph Eric Drohan, was convicted by a jury of one count of third degree criminal sexual conduct,[1] and one count of fourth degree criminal sexual conduct.[2] Following the jury's verdict, defendant acknowledged to being a third habitual offender.[3] (95a-96a).

At trial, the People established that defendant forced the victim to perform fellatio on him in his car parked in a parking structure. (34a-35a, 51a-53a). On a separate occasion, when the company that both defendant and the victim worked for was moving, defendant came up behind the victim and grabbed her hand and placed her hand on his crotch. (36a, 56a-59a, 92a).

The defense acknowledged the incidents and many others, but claimed that they were consensual. (39a-42a, 89a-90a).

Judge Tyner sentenced defendant within the statutory guidelines[4], to a term of 10 years seven months to 30 years on the third degree criminal sexual conduct/third habitual offender conviction, and a concurrent term of one to four years on the fourth degree criminal sexual conduct/habitual third conviction. (124a).[5]

The Court of Appeals affirmed defendant's conviction and sentence.[6](20a-27a).

Additionally, the People will accept defendant's statement of facts.

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[1] MCL 750.520d(1)(b).
[2] MCL 750.520e(1)(b).
[3] MCL 769.11.
[4] The guidelines were scored at 51 to 127 months. (113a)
[5] Defendant challenged the scoring of OV 4, OV 8, and OV 10. Judge Tyner ruled in defendant's favor on OV 8 and reduced the score from 15 points to zero, but she found that there was evidence to support the scoring of OV 4 and OV 10. The reduction of 15 points did not alter the sentencing range.
[6] *People v Drohan*, 264 Mich App 77; 693 NW2d 750 (2004).

SUMMARY OF ARGUMENT

The United States Supreme Court has decided a line of cases that define the types of facts that must be proven to a jury beyond a reasonable doubt before the sentencing judge can use these facts to increase the defendant's maximum sentence. These cases culminated in decisions in *Blakely* and *Booker*.

Blakely applies to *determinate* sentencing schemes where the statutory guidelines *require* a fixed sentence be imposed within a range calculated after the jury's verdict, with the statutory scheme permitting the judge to enhance the *maximum* sentence based on judicial factfinding.

Booker applied the reasoning of *Blakely* to the Federal Sentencing Guidelines. Under these cases, the relevant statutory maximum is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by defendant. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.

Michigan has an indeterminate sentencing scheme with legislative guidelines that only set the minimum sentence for a defendant and do not increase the statutory maximum sentence. *Blakely* and *Booker* both noted that they do not apply to indeterminate sentencing systems.

In Michigan when a trial judge exercises his discretion to select a sentence within the guideline range, the defendant has no right to a jury determination of the facts that the judge deems relevant because the statutory maximum has been set by the legislature.

ARGUMENT

I. THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL IS NOT AFFECTED BY MICHIGAN'S INDETERMINATE SENTENCING SCHEME AND LEGISLATIVE GUIDELINES, BECAUSE NEITHER ALLOWS A DEFENDANT'S MAXIMUM SENTENCE TO BE RAISED ON THE BASIS OF JUDICIAL FACT FINDING.

Standard of Review

Issues of constitutional law are reviewed de novo. *People v Nutt,* 469 Mich 565; 677 NW2d 1, 5 (2004).

Issue Preservation

Defendant did object to the scoring of OV 4, and OV 10, but not OV 12. Defendant did not object that the scoring of the guidelines violated due process. Because *Blakely v Washington,* 542 US____; 124 S Ct 2531; 159 L Ed 2d 403 (2004) was an application of *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), defendant would have to have objected to preserve this issue.

Analysis

In all criminal prosecutions, the accused has a right to a trial by an impartial jury. US Const, Am VI, and Const 1963, art 20, § 20. Michigan's substantive criminal law is sanction specific and proscribes a particular sentence for each violation of its criminal law.[7]Judges are entrusted to carry out a sentence within the legislative framework. In Michigan, a sentencing court does not have any discretion in setting the maximum sentence for a conviction.

[7] For statutes without prescribed penalties there are other statutes that set the penalty: MCL 750.504 for misdemeanors, MCL 750.503 for felonies, and MCL 750.505 for common law offenses.

In re Pardee, 327 Mich 13, 17-18; 41 NW2d 466 (1950) cert den 339 US 961 (1950); MCL 769.8(1). ("The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence"). Moreover, a defendant's minimum sentence may not exceed 2/3 of the statutory maximum sentence. MCL 769.34(2)(b), ["The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence."],. *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). Imposed over these parameters in Michigan's indeterminate sentencing scheme are statutory guidelines that set the range for the minimum sentence.

As a majority of this Court has indicated, *Blakely v Washington, supra,* is inapplicable to the Michigan statutory sentencing guidelines because *Blakely* applies to determinate sentences, and Michigan follows an indeterminate sentencing scheme.. *Claypool, supra.* A jury verdict automatically entitles, and many times requires, the sentencing court to impose the statutory maximum without making any factual findings. MCL 769.8(1). (Required indeterminate sentencing with maximum set by statute). Any factual findings made by the sentencing courts in scoring the sentencing guidelines solely affect a defendant's minimum sentence, and do not implicate *Apprendi v New Jersey, supra et al.*

A. Cases Preceding *Blakely v Washington, and United States v Booker*

Blakely v Washington, supra, was the culmination of a line of cases begun by *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970). *In re Winship, supra,* had indicated that the due process of law includes protecting a defendant against conviction except by proof beyond a reasonable doubt of every element of the crime, *i.e.,* every fact necessary to constitute a crime with which he is charged. 397 US at 364. This was followed by *Mullaney v Wilbur*, 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975) and *Patterson v New York*, 432 US 197; 97 S Ct

2319; 53 L Ed 2d 281 (1977) that reached seemingly different results on similar facts and statutes. In *Mullaney,* the Maine murder statute defined murder in a way that allowed the prosecution to prove that a killing was intentional and unlawful and that malice would then be presumed. In order to reduce the crime to manslaughter, the defendant had to prove by a preponderance of the evidence that he acted in the heat of passion on provocation. The Supreme Court found that this burden shifting was improper. While in *Patterson*, the New York statute did not include malice aforethought as an element of the "murder two" statute. However, a defendant could reduce the crime to manslaughter if he proved that he acted under "extreme emotional disturbance." Defendant argued that *Mullaney* controlled, but the Supreme Court determined that the absence of a malice requirement from the murder statute treated all murder as murder unless defendant demonstrates mitigating circumstances. The absence of a statutory presumption in the framing of the statute did not violate defendant's due process rights. These cases demonstrate that legislatures have the ability to define the facts necessary that constitute the crimes with which a defendant is charged. This is the start of separation of criminal elements from sentencing factors.

In *McMillan v Pennsylvania,* 477 US 79;106 S Ct 2441; 91 L Ed 2d 67 (1986), the state imposed a mandatory minimum sentence of five years if a judge found that the defendant visibly possessed a firearm while committing another felony. *McMillan* argued that the possession of the firearm was an element of the offense that must be proven beyond a reasonable doubt under *Mullaney*. The Supreme Court held that the mandatory minimum sentence requirement did not "relieve the prosecution of its burden of proving guilt." *McMillan, supra,* at 87. More importantly, the Court found the statute constitutional because it did not increase the penalty

above the statutory maximum. Rather, the statute only narrowed the possible sentence range. *McMillan, supra*, at 88.[8]

The Supreme Court in *McMillan* stated that, "we should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties." The Court also said that preventing and dealing with crime was much more the business of the states than it was the federal government, and the Court should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states. 477 US at 85, 86.

The Supreme Court in *Almendarez-Torres v United States*, 523 US 224; 118 S Ct 1219; 140 L Ed 2d 350 (1998) discussed the differences between elements of a crime which must be listed in the charging document and found by a jury beyond a reasonable doubt, and mere sentencing factors. Defendant was charged with reentering the United States when he had been previously deported. The statute called for a sentence of two years unless the deportation was subsequent to a criminal conviction. Defendant had a prior conviction for an aggravated felony, which increased the maximum penalty to 20 years. Defendant maintained that the fact of his prior conviction should have been listed on the indictment. The Court disagreed finding that recidivism was historically a sentencing concern, and not an element of a crime, and did not have to be listed in the indictment.

The question of criminal elements and sentencing factors resurfaced in *Jones v United States*, 526 US 227; 119 S Ct 1215; 143 L Ed 2d 311 (1999), when the Court considered the

[8] The Court's decision was consistent with its holding in *Williams v New York*, 337 US 241, 244-252; 69 S Ct 1079; 93 L Ed 1337 (1949). It is ironic that the Court noted that indeterminate sentences had "to a large extent taken the place of the old rigidly fixed punishments." *Williams* 337 US at 248.

question of whether facts unrelated to recidivism that elevated the defendant's statutory maximum had to be proven to a jury beyond a reasonable doubt. Jones was charged under the federal carjacking statute. The statute had a 15-year maximum unless the judge at sentencing found serious bodily injury, which increased the penalty to 25 years, and if death resulted, then the maximum penalty was life. The trial court elevated defendant's sentence from 15 to 25 years because the court determined that the victim had suffered serious bodily injury. The Court set out a bright-line rule:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, and submitted to a jury, and proven beyond a reasonable doubt. *Jones,* 526 US at 243 n 6.

The Court characterized its result as interpreting a federal statute, and not making a constitutional rule.

One year later, the Court set out a constitutional definition in *Apprendi v New Jersey, supra* and clarified the definition of "element" as "any fact which increases the penalty beyond the prescribed statutory maximum." 530 US at 490. In *Apprendi*, defendant in a plea bargain tendered a guilty plea to [2] counts of unlawful possession of a firearm and one count of possession of a bomb. The trial court enhanced the sentence after determining that defendant had acted with an intent to intimidate an individual based on the victim's race. The trial court increased the sentence from 10 years to 12 years based on its finding that defendant had committed a hate crime. The Supreme Court stated its Constitutional rule as:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi*, 530 US at 490.

Ring v Arizona, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002) dealt with a trial court's findings after a jury determination of guilt in a capital case. Consistent with its decision in *Apprendi,* the Supreme Court invalidated the court imposed death sentence, finding that defendant had a Sixth Amendment right to a jury trial on the aggravating factors necessary for a death sentence. "[B]ased solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment" because under Arizona law, "a death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist beyond a reasonable doubt" by a judge rather than a jury. *Ring* 536 US at 597.

Decided the same day as *Ring*, was *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 5324 (2002) where the United States Supreme Court explained:

> *McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases. *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding. As *McMillan* recognized, a statute may reserve this type of factual finding for the judge without violating the Constitution. *Harris*, 536 US at 557.

In *Harris*, however, the Supreme Court found that a trial court's decision to impose a mandatory minimum sentence based on a factual finding on a less than beyond-a-reasonable-doubt standard of proof **did not implicate due process**. (Emphasis supplied) The Court stated that facts affecting a **minimum sentence** did not constitute elements of the crime as defined in

Apprendi. 536 US at 568. *Harris* also confirmed the continued validity of *McMillan v Pennsylvania, supra,* which had previously made this same finding.[9] *Id.*

Harris[10] reiterated that constitutional guarantees only attach to those factors which are defined as essential elements of the crime, and that a court could legitimately impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed. 536 US at 549. *Harris* specifically indicated that *statutes* could legitimately, without implicating due process, direct judges to give specific weight to certain facts when choosing the sentence as long as those factors did not increase the defendant's statutory maximum. 536 US at 549-550.

These cases set the stage for the Supreme Court's decisions in *Blakely and Booker,* and this Court's grant of leave to appeal for a decision on how, if at all, these cases affect Michigan's sentencing scheme.

B. *Blakely v Washington and Booker v United States*

The Supreme Court's decision in *Blakely v Washington, supra* involved a sentencing scheme which impacted a defendant's maximum sentence, and involved a determinate sentencing scheme. In *Blakely*, the United States Supreme Court invalidated the sentencing

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[9]In *McMillan*, the trial court imposed a mandatory minimum sentence after finding by a preponderance of the evidence that the defendant visibly possessed a firearm during the commission of the offense. In *Harris*, the Court confirmed the constitutionality of a statute that allowed imposition of a mandatory minimum sentence for brandishing *or discharging a weapon.* The Supreme Court stated in *McMillan*, 477 US at 89 "The Pennsylvania Legislature did not change the definition of any existing offense. It simply took one fact that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight to be given that factor if the instrumentality is a firearm." See also: *Harris*, 536 US at 568

[10] *Harris* was convicted under a federal statute that imposed a mandatory minimum sentence of five years for carrying a firearm, seven years if the firearm was brandished and 10 years if the weapon was discharged.

scheme of the State of Washington on the grounds that it violated the strictures of *Apprendi*. In *Blakely*, the defendant pled guilty to the crime of second degree kidnapping. In Washington, every defendant convicted of this offense was exposed to a determinate maximum sentence within the statutory guidelines of 49 to 53 months. If the court found substantial and compelling reasons based on factual findings, the court could depart above the guideline maximum, but no higher than 120 months, the statutory maximum. WA ST 9.94A.535, 9.94A.505(5) In *Blakely*, the sentencing court had increased the defendant's maximum sentence to 90 months incarceration based on a factual finding (after defendant objected, and the trial court held a three day bench hearing, and 32 findings of fact by the trial court) that the defendant acted with deliberate cruelty. 124 S Ct at 2534.

Justice Scalia, writing for the majority, opined that the "case requires us to apply the rule we expressed in *Apprendi v New Jersey,* (citation omitted). 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" The United States Supreme Court found that, because the statutory scheme allowed the court to increase the maximum sentence above that allowed by a jury verdict/plea based on a factual finding by the court, the court's elevation violated *Apprendi*. The Court stated, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment.'" (emphasis in original) 124 S Ct at 2537. The *Blakely* Court wanted to prevent the jury from being reduced merely to a gate-keeping function in which a defendant convicted of a crime carrying a five-year maximum for example, could face up to a

life sentence based solely on a court's factual findings. 124 S Ct at 2542. The Court reiterated, however, that if the jury verdict alone authorized the sentence, it was permissible under *Apprendi* 124 S Ct at 2537, 2538. Therefore, if a crime allowed for a life sentence, and the court gave a sentence under the maximum allowed by law, it would not violate procedural due process.

The State of Washington argued that under *McMillan v Pennsylvania, supra* and *Williams v New York, supra* the sentence was proper. The Court then specifically distinguished *McMillan*[11] based on its decision in *Harris*, in which the trial court imposed a mandatory minimum sentence based on facts found by the court, not a jury, by a less than beyond-a-reasonable-doubt standard, and cited these cases with approval. 124 S Ct at 2538. The court noted that *Williams* involved "an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death." "The judge could have 'sentenced [the defendant] to death giving no reason at all.' Thus, neither case involved a sentence greater than what state law authorized on the basis of the verdict alone." (Internal citations omitted). 124 S Ct at 2538

Recognizing that Washington had implemented a determinate sentencing scheme, the Supreme Court did not find the scheme unconstitutional, but only the way it had been implemented with respect to the Sixth Amendment. 124 S Ct 2540. The majority, in answering the dissent's argument that because indeterminate sentencing is constitutional and determinate sentencing involves less judicial discretion, it follows that determinate sentencing must be

[11] In *McMillan*, the case involved a similar sentencing scheme as that in Michigan, where the court imposed both a minimum and maximum sentence. *McMillan v Pennsylvania*, 477 US at 82, n 2. *Blakely* noted that in *McMillan* and *Harris*, the statutes [which allowed imposition of a mandatory minimum sentence] did not authorize a sentence in excess of that otherwise allowed for the underlying offense. 124 S Ct at 2538

constitutional, Justice Scalia noted that the Sixth Amendment is not a limitation on judicial power but a reservation of jury power. In explaining why indeterminate sentencing with its increased judicial discretion is constitutional, Justice Scalia asserts that judicial discretion is increased under an indeterminate system, "but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty". Moreover, the same standard is not employed when a sentencing judge finds mitigating factors that lower a potential sentence. This judicial factfinding of aggravating factors "does not pertain to whether defendant has a legal right to a lesser sentence." 124 S Ct 2540.

Justice Scalia, writing for the majority, also indicated that *indeterminate* sentencing schemes did not suffer from the same constitutional infirmities as *determinate* schemes. Washington had a sentencing scheme in which the court selected one [determinate] number for a defendant's sentence. Once the defendant started serving the sentence, he could not be paroled. Justice Scalia compared that scheme to an indeterminate scheme:

> [Indeterminate sentencing] increases judicial discretion, to be sure, *but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty.* Of course, indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) *may implicitly rule on those facts he deems important to the exercise of his sentencing discretion.* But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence--*and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.* In a system that says a judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence--and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury. (emphasis supplied) *Blakely*,124 S Ct at 2540.

Blakely, then, applies to *determinate* sentencing schemes where the statutory guidelines *require* a fixed sentence be imposed within a range, with the statutory scheme permitting the judge to enhance the *maximum* sentence based on judicial factfinding.

In *United States v Booker, supra,* and the companion case of *United States v Fanfan, supra,* the Supreme Court was deciding whether its holding in *Blakely* was applicable to the federal sentencing guidelines that were promulgated through a sentencing commission authorized by Congress. Defendant, Booker, was convicted of possession with intent to distribute 50 grams or less of crack cocaine. The federal guidelines were calculated at 210 to 262 months. Defendant was sentenced to 30 years based on factfinding made by the judge that he, Booker, had intended to distribute over 500 grams of crack cocaine. The 7th Circuit Court reversed the district court based on *Blakely* and *Apprendi*. The other defendant, Fanfan, was convicted of conspiracy to distribute at least 500 grams of cocaine. The guidelines called for a maximum sentence of 78 months. At a sentencing hearing, the judge determined facts that would have authorized an increased sentence of 188 to 235 months. Fanfan was sentenced to 78 months.

The Supreme Court decision in *Booker* produced six opinions, which included competing 5-4 majorities, with only Justice Ginsburg being in the majority in the merits decision and the remedy decision. Justice Stevens, writing for the majority on the merits, determined that *Blakely* applies to the Federal Sentencing Guidelines. Justice Breyer, writing for the remedial majority, held that the proper remedy was to sever the mandatory parts of the guidelines resulting in a nonmandatory federal sentencing system.

In Justice Stevens' opinion he noted that:

> Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA the provisions that make the guidelines

> binding on district judges; it is that circumstance that makes the Court's answer to the second question presented possible. For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant. 125 S Ct at 750.

The Court recognized that jury factfinding may not be the most expedient and efficient sentencing of defendants, but the Sixth Amendment right to a jury trial has always outweighed the interest in concluding trials swiftly. On the merits, the court applied its holding in *Blakely* to the federal sentencing guidelines. Justice Breyer, in his remedial majority, determined that the guidelines were not mandatory and severed that part that made them mandatory. Justice Breyer rejected a remedy of engrafting on to the guidelines a provision that would require a sentencing jury. 125 S Ct at 757. Justice Stevens, in his dissent to the remedy portion of *Booker,* restated the merits holding:

> [T]hat *Blakely* applies to the Guidelines does not establish the "impermissibility of judicial factfinding." Instead, judicial factfinding to support an offense level determination or an enhancement is only unconstitutional when that finding raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant. 125 S Ct at 775.

Counting heads in *Booker,* while difficult because of the numerous opinions, it appears that all 9 Justices have committed themselves to the continuing viability of judicial factfinding under a sentencing model that allows full judicial discretion within statutory ranges. 125 S Ct at 750 (Justice Stevens) and 125 S Ct at 764 (Justice Breyer). Moreover, no single Justice has announced a position that indeterminate sentencing requires jury factfinding on minimum sentences.

C. Other State's Responses to *Blakely* and *Booker*

Justice O'Connor, in her dissent in *Blakely,* noted that the decision would have consequences for states that have enacted sentencing guidelines, and for the federal guidelines. *Blakely, supra* at 2548-2549. Including the federal government and the District of Columbia, there are twenty jurisdictions that have some form of guidelines. Some states' guidelines are mandatory, others presumptive, while still others are permissible. Included in these categories are determinate and indeterminate sentencing schemes. At least one state (Wisconsin) has limited guidelines that apply only to a few (11) crimes. For a summary of the types and scope of the guidelines see Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 Colum L Rev 1190, 1196 (2005).

Justice O'Connor's prediction that indicated that numerous states have guidelines that will be affected by the *Blakely* decision, has proven to be correct, at least in states that employ determinate sentencing systems. Nine states that have determinate sentencing and some form of presumptive or mandatory guidelines have ruled that *Blakely* does affect the sentencing in their state[12]. Eight other states have found that their sentencing schemes are in compliance with *Blakely* and/or *Booker* and pass constitutional muster.

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[12] In *Arizona v Brown*, 209 Ariz 200; 99 P3d 15 (2004), the defendant pled to reckless manslaughter in the death of his father and brother. The presumptive sentence for this class two felony is five years. The plea agreement indicated that there was a minimum sentence of three years or a possible sentence of 12 ½ years if the trial judge found aggravating factors. The trial court exceeded the five-year presumptive sentence. The Arizona Supreme Court held that the maximum sentence that the court could impose was the five-year presumptive sentence under the states **determinative sentencing scheme**. The Colorado Supreme Court in *Lopez v People*, 113 P3d 713 (Colo. 2005) determined that the sentence based on a prior conviction was proper even though it exceed the presumptive range of the states **determinate sentencing scheme.** In *Smylie v Indiana* 823 NE2d 679 (Ind. 2005) the Indiana Supreme Court determined that Indiana's "**fixed term**" is the functional equivalent of Washington's standard range. Kansas has the most widely known and cited case of *People v Gould*, 23 P3d 801 (Kan 2001). Kansas requires a jury finding of all aggravating facts before a trial court can exceed the top of the guideline range. The state uses **presumptive guidelines** and a **determinate sentencing approach**. In accord *State v*

California v Black, 35 Cal 4th 1238, 29 Cal Rptr 3d 740, 113 P3d 534 (2005), involved the combination of one determinate sentence and two indeterminate sentences that were imposed consecutively. The law required the sentence enhancements to be charged and proved to the jury, along with providing three levels of sentencing for each crime. The middle level is required to be imposed unless the court finds aggravating or mitigating circumstances. The California Supreme Court held that the upper level term is the statutory maximum for purposes of Sixth Amendment analysis. The majority distinguished *Blakely* based on the level of discretion afforded the sentencing judges and that the jury's verdict authorized the court to impose a consecutive sentence.

In *Fuller v Delaware*,___ A2d ___ (Del. 2004), the state Supreme Court held that Delaware has an indeterminate sentencing system. The guidelines are voluntary and the sentencing judge is not bound by the guidelines. Hawaii announced that *Blakely* did not apply to its "extended term sentencing structure" which is indeterminate. *Hawaii v Larry Rivera*, 106 Hawaii 146, 102 P3d 1044, 1054-1055 (2004). Idaho announced that its indeterminate

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Schofield,___A2d___(Maine June 29, 2005). North Carolina has changed its **determinate sentencing system** through a Supreme Court decision and the passage of new law. In *State v Allen*,___ SE2d ___(N. C 2005) where the judge imposed a sentence 18 months above the presumptive maximum sentence for the defendant's child abuse conviction, the Supreme Court found that only facts found by a jury would support raising the presumptive maximum sentence. The legislature of North Carolina responded with a law entitled "An Act to Amend State Law Regarding the Determination of Aggravating Factors in a Criminal Case to Conform with the United States Supreme Court Decision in Blakely v Washington." The law calls for a jury to determine all aggravating factors simultaneously with its verdict on guilt or innocence. The Supreme Court of Minnesota issued an order that there could not be upward departures from the presumptive sentences. *State v Shattuck*, (C6-03-362, 2004). In *State v Dilts*, 337 Or 645; 103 P3d 95 (2004) on remand from the United States Supreme Court, it was determined that exceeding the presumptive sentence violated defendant's right to a trial by jury, in Oregon's **determinate sentencing scheme**. Of course the Washington Supreme Court has followed the United States Supreme Court's decision in *Blakely*. *Washington v Hughes*, ___P3d ___ (Wash. 2005), and *Washington v Recuenco*, ___P3d ___(Wash. 2005).

sentencing system, in which a defendant is given a minimum and a maximum, is not affected by *Blakely. Idaho v Stover*, 140 Idaho 927, 104 P3d 969 (2005). New York's highest court found that a persistent felony offender scheme that enhanced defendant's sentence for an indeterminate period up to life was not in conflict with *Blakely or Booker. People v Riveria*,___NE2d___ (N.Y. 2005).

Tennessee applied a plain error analysis announcing that its determinate sentence system did not violate the Sixth Amendment, and affirmed sentences totaling 49 years in *Tennessee v Gomez*, 163 SW3d 632 (Tenn 2005) reh den. The Massachusetts Court of Appeals noted that *Blakely* did not apply where the sentencing judge found aggravating circumstances that exceeded the nonbinding sentencing guidelines. The sentence remained within the statutory maximum under the Massachusetts indeterminate sentencing scheme. *Commonwealth v Junta*, 62 Mass App Ct 120, 815 NE2d 254, 261-262 (2004). Pennsylvania's appellate court has twice determined that its indeterminate system with guidelines does not run afoul of *Blakely. Commonwealth v Bromley*, 862 A2d 598 (Penn. 2004) and *Commonwealth v Smith*, 863 A2d 1172 (Penn. 2004).

All states that employ some form of indeterminate sentencing system and that have considered the issue have determined that *Blakely* does not affect their sentencing system. Even California, which has mostly a determinate sentencing system, has held that *Blakely* does not affect their sentencing system.

D. Application of *Blakely v Washington,* to the Michigan Sentencing Guidelines.

Blakely v Washington, supra does not impact the Michigan sentencing scheme. In Michigan, unlike Washington, the statutory guidelines pertain to a defendant's minimum sentence, not the maximum. MCL 769.34(2). Because *Blakely* specifically cited *Harris v United*

States and *McMillan v Pennsylvania, supra* with approval [124 S Ct at 2538] which held that a judge could make factual findings that determine a defendant's minimum sentence on a less than beyond-a-reasonable-doubt standard of proof, any findings concerning a defendant's minimum sentence do not run afoul of *Blakely.*[13] In Michigan's system of legislative guidelines, the legislature has not put an intermediate level on what a judge can sentence to by judicial fact finding. Michigan's indeterminate sentences with guidelines attempt to reduce disparities in the punishment of similarly situated defendants. The judge's authority to sentence is formally derived from the jury's verdict. Except for prior convictions with punishment as habitual offenders, the statutory maximum that a judge may impose is based solely on the facts reflected in the jury's verdict or admitted by the defendant.

In 1994, the Legislature appointed an independent commission and charged it with designing and recommending to the Legislature guidelines, which would have the status of law. The sentencing commission was able to evaluate the effect of the judicial sentencing guidelines on trial and appellate courts prior to adoption of legislative sentencing guidelines.[14] The Legislature gave the sentencing commission the following tasks concerning the sentencing guidelines:

> Develop sentencing guidelines, including sentence ranges for the minimum sentence for each offense and intermediate sanctions as provided in subsection (3), and modifications to the guidelines as provided in subsection (5). The sentencing guidelines and any modifications to the guidelines shall accomplish all of the following:

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[13] In no way can it be said that the sentencing judge in setting the minimum, even by departing from the guidelines, is setting the statutory maximum as in *Blakely* because it is quite possible that defendants will not be paroled and will serve above the minimum sentence. In Michigan, it is only the maximum that a defendant cannot serve above, the maximum the jury verdict allowed.

[14] *People v Mitchell*, 454 Mich 145 at 174 n 34; 560 NW2d 600 (1997).

(i) Provide for protection of the public.

(ii) An offense involving violence against a person shall be considered more severe than other offenses.

(iii) Be proportionate to the seriousness of the offense and the offender's prior criminal record.

(iv) Reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences. ["Offense characteristics" means the elements of the crime and the aggravating and mitigating factors relating to the offense that the commission determines are appropriate and consistent with the criteria mentioned in section 33(1)(e) of this chapter.[15]]

(v) Specify the circumstances under which a term of imprisonment is proper and the circumstances under which intermediate sanctions are proper.

(vi) Establish sentence ranges for imprisonment that are within the minimum and maximum sentences allowed by law for the offenses to which the ranges apply.

(vii) Establish sentence ranges the commission considers appropriate. [16]

The philosophy of the guidelines was to ensure that violent and repeat offenders would be treated more severely than other offenders and that sentencing practices would be more proportionate to both the seriousness of the offense and the offender's prior criminal record.[17] Departures from the guidelines would be exceptions only allowed when substantial and compelling reasons were

[15] PA 1994, No. 445; MCL 769.31(e) [modified by PA 2002, No. 31] See n 21 *infra*

[16] PA 1994, No. 445; MCL 769.33 repealed [by PA 2002, No. 31] after the Sentencing Guidelines Commission had completed its task (i.e. after the sentencing guidelines had been passed by the legislature and initial modifications had been proposed).

[17] House Legislative Analysis, HB 5419, May 12, 1998, September 23, 1998; Senate Fiscal Agency Bill Analysis, SB 826, October 23, 1998; *People v Babcock,* 469 Mich 247, 263-264; 666 NW2d 231 (2003).

present.[18] In the mission statement of the Michigan Sentencing Guidelines Commission, the Commission stated that its goal was, to "[d]evelop sentencing guidelines which provide protection for the public, are proportionate to the seriousness of the offense and the offender's prior record, and which reduce disparity in sentencing throughout the state." [19]

Though the commission began its work in 1995, the new statutory guidelines did not go into effect until January 1, 1999.[20] After 1999, the sentencing commission was charged with developing modifications to the guidelines until January 1, 2001.[21]

Under the legislative guidelines, to determine a minimum sentence range, the sentencing court is required to determine the offense category.[22] Then, the sentencing court must determine which offense variables (OVs) are applicable, score those variables and total the points to determine the total OV score.[23] The sentencing court also must score all prior record variables (PRVs).[24] The offender's OV score and PRV score are then used to determine the appropriate cell of the applicable sentencing grid.[25]

Applying the legislative guidelines to Michigan's indeterminate sentencing scheme does not transform sentencing factors into elements of a crime. Furthermore, nowhere did *Blakely* state it was changing the definition of "element" as previously posed by *Apprendi*, but merely that it was applying its holding in *Apprendi* to the facts before it. 124 S Ct at 2536. *Apprendi* had specifically stated, "nothing in [our] history suggests that it is impermissible for judges to

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[18] MCL 769.34(3)
[19] *Report of the Michigan Sentencing Commission, supra* at 6
[20] House Legislative Analysis, HB 5419, May 12, 1998, September 23, 1998
[21] *Id.*
[22] MCL 777.21(1)(a)
[23] *Id.*
[24] MCL 777.21(1)(b)
[25] MCL 777.21(1)(c); *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004)

exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a sentence *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case." (emphasis original) 530 US at 481-482, 497 n 21. The holding, then, of *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt," [530 US at 490] by its own terms, has nothing to do with "imposing a judgment *within the range* prescribed by statute," *where* the trial judge is free to take "into consideration various factors relating *both to offense* and offender." Therefore, the state is free to create a statutory scheme including using offense variables to establish sentences within the range prescribed by statute as long as the sentence is within the statutorily set maximum.

Also in Michigan, a jury verdict allows a judge to set the defendant's maximum at up to the statutory maximum of the particular crime defendant was convicted of. MCL 769.8(1) Defendants receive notice from the very inception of the case that the jury verdict would allow a maximum sentence of up to the statutory maximum. A judge does not have to make any factual findings at all to impose the statutory maximum. In like manner, a judge in Michigan is not permitted to sentence a defendant to a maximum sentence higher than the statutory maximum. It is only if a judge were able to impose a sentence higher than the statutory maximum, would the sentence violate *Blakely*.

In Michigan the sentence imposed, when a prison sentence, must be indeterminate [other than for a few specified crimes such as felony firearm where the statute requires imposition of a

determinate sentence]. The parole board determines defendant's eventual eligibility for parole. MCL 791.234. Indeterminate sentencing is defined as the following:

> The practice of not imposing a definite term of confinement, but instead prescribing a range for the minimum and maximum term, leaving the precise term to be fixed in some other way, usu. based on the prisoner's conduct and apparent rehabilitation while incarcerated.
>
> 1. A sentence of an unspecified duration, such as one for a term of 10 to 20 years. 2. A maximum prison term that the parole board can reduce through statutory authorization, after the inmate has served the minimum time required by law.

Black's Law Dictionary, (7th ed. 1999); See also: MCL 769.8(1), MCL 791.234 (indicating that Michigan has an indeterminate sentencing scheme). The majority in *Blakely* indicated that indeterminate sentencing schemes did not offend procedural due process.[26] *Booker* noted that when a trial judge exercises his or her discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant. The sentencing in *Booker* 125 S Ct at 752, was under a new set of circumstances found by the judge. The Supreme Court stated that the jury needs to stand between the individual and the power of the government under these sentencing circumstances. This does not mean that the term sentencing factor is devoid of meaning. The term describes circumstances either aggravating or mitigating in character that supports a specific sentence within a range authorized

[26] Defendant's position implies that only if the legislature provided no guidance to a court in arriving at an appropriate sentence would the sentencing scheme be truly indeterminate and pass the strictures of *Apprendi* and *Blakely*. However, if the facts judges consider when exercising their discretion *within the statutory range* are not elements, they do not become as much merely because the legislatures require the judge to impose a minimum sentence when those facts are found. *McMillan* 477 US at 92.

by the jury's finding of guilt, and the legislature's definition of the crime. The legislature establishes what punishment is available by law, while a court sets a specific punishment within the bounds that the law prescribes. *McMillan* allows the legislature to take a traditional sentencing factor and dictate the precise weight the judge should attach to that factor. Neither the prosecution nor the judiciary should be creating new crimes by adding elements to offenses.

The Federal Guidelines were held not to violate the separation of powers because they "do not bind or regulate the primary conduct of the public." *Mistretta v United States*, 488 U S 361; 109 S Ct 647; 102 L Ed 2d 714 (1989).

The Supreme Court has approved sentencing that allows a judge to find facts bearing on the appropriate sentence for a crime after a guilty verdict, and to make "qualitative judgment" about the proper punishment within an authorized range. *Williams v New York, supra. Ring, supra*, then made clear that for purposes of *Apprendi*, the "prescribed statutory maximum" is the maximum sentence that may be imposed without the finding of any additional legislatively specific facts. Neither *Ring* nor *Apprendi* altered the *Williams v New York* holding that a judge make "qualitative judgments" about the proper level of punishment within the range supplied by the legislature in a statute. Judgments may be on facts found by the judge. For a defendant has no claim that he was blindsided about the available punishment. *Apprendi* was designed to guarantee that someone accused of a crime is able to know with certainty the maximum punishment that he is exposed to for committing the crime. Thus, *Blakely and Apprendi* are concerned exclusively with facts that are going to the severity of the offense.

A majority of this Court in *People v Claypool, supra* indicated that *Blakely v Washington, supra*, did not impact the Michigan legislative sentencing guidelines. Justices Taylor and Markman indicated that Michigan has an indeterminate sentencing system in which the

maximum is not set by the judge but instead set by law and noted that a court's sentence could never increase the maximum [except for habitual offender sentences which were excluded from *Blakely's* holding]. Justices Taylor and Markman noted that the majority in *Blakely* specifically approved the constitutionality of indeterminate sentencing schemes. *Claypool, supra* at 730 n 14, Taylor, J. *writing for the majority.* Justice Corrigan agreed with the majority that *Blakely* did not invalidate Michigan's indeterminate sentencing scheme.[27] *Id.*, at 739, Corrigan, J., *concurring in part, dissenting in part.* Justice Cavanagh agreed with the majority's conclusion that *Blakely v Washington, supra*, did not appear to affect "scoring decisions that establish *minimum* sentences" (emphasis original) such as in Michigan. *Id.* at 741, Cavanagh, J., *concurring in part, dissenting in part.* Justice Weaver concurred with the majority's conclusion that *Blakely* did not affect Michigan's scoring system which establishes the recommended *minimum* sentence, but only those facts which increase the penalty for the crime beyond the prescribed maximum. *Id.* at 744, Weaver, J., *dissenting in part, concurring in part.* Justice Young concurred that Michigan's sentencing scheme is unaffected by *Blakely. Id.* at 744, n 1, Young, J., *concurring in part, dissenting in part.* Justice Kelly did not render an opinion but solely indicated that the issue needed full briefing. *Id.* at 748, Kelly, J., *concurring in part, dissenting in part*

A court can, without violating *Apprendi v New Jersey, supra* and *Blakely v Washington*, establish a defendant's minimum sentence based on factual findings on a less than beyond-a

[27] Justice Corrigan noted, however, "the majority's sweeping language regarding judicial powers to effect departures (not limited to downward departures) will invite challenges to Michigan's scheme." Justice Corrigan also believed that mandatory minimum sentences could be vulnerable under *Blakely. Id.*, 739. However, in the case at bar, the sentencing court did not exceed from the sentencing guidelines and a mandatory minimum sentence was not imposed.

reasonable-doubt standard. Therefore procedural due process is not violated by findings on the offense variables on a less than beyond-a-reasonable-doubt standard. "There is, after all, only one Due Process Clause in the Fourteenth Amendment." *McMillan v Pennsylvania*, 477 US at 91. The United States Supreme Court in *McMillan* indicated that "sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all" [citing *Williams v New York, supra*)] and noted that the Court had consistently approved of sentencing schemes which mandated consideration of facts related to the crime. 477 US at 91-92. *McMillan* also noted that there was no Sixth Amendment right to a jury sentencing, even when the sentence turned on specific findings of fact.[28] 477 US at 93.

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[28]In *Blakely* itself, the Supreme Court cited *Williams v New York, supra* with approval. *Blakely* stated:

> *Williams* involved an indeterminate sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death. 337 US., at 242-243, and n. 2. The judge could have "sentenced [the defendant] to death giving no reason at all." *Id.* at 252. Thus, neither case [*McMillan* nor *Williams*] involved a sentence greater than what state law authorized on the basis of the verdict alone. 124 S Ct at 2538.

In *Williams v New York, supra* the United States Supreme Court found that it did not violate the due process clause of the Fourteenth Amendment for the Court to rely on out-of-court sources [*i.e.* not facts found by the jury or admitted by the defendant] for imposition of the death penalty. The Court stated:

> But both before and since the American colonies became a nation, courts in this county and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.
>
> * * *
>
> The considerations we have set out admonish us against treating the due-process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.

It is within the power of the state to regulate procedures under which its laws are carried out, and its decision is not subject to proscription under the due process clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McMillan v Pennsylvania*, 477 US at 85. This Court has stated that as long as a factor does not constitute an element of the crime as defined by *In re Winship, supra*, fundamental due process at sentencing merely requires that the sentence be based on accurate information which the defendant had a reasonable opportunity to challenge. *People v Eason*, 435 Mich 228, 233; 458 NW2d 17 (1990), (indicating that due process does not require trial-type evidentiary burdens on the sentencing process); *People v Miles*, 454 Mich 145, 173-174; 560 NW2d 600 (1997). This Court in *People v Walker*, 428 Mich 261, 267-268; 407 NW2d 367 (1987) established the preponderance-of-the-evidence standard to determine contested factual matters at sentencing proceedings.

It is clear that defendants have the ability to challenge a sentencing court's scoring of the sentencing guidelines, and the prosecution must prove the facts underlying the offense variable scoring by a preponderance of the evidence if effectively challenged by defendant. Due process requires nothing more. Procedural due process does not constrain the Legislature's selection of certain factors it believes are important for sentencing of defendants.[29]

All sentencing systems involve tradeoffs, while having a goal of striving for equilibrium between uniformity and individualization in a way to yield a fair result. The federal guidelines

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337 US at 246, 250-251 In accord: *Payne v Tennessee*, 501 US 808, 820; 112 S Ct 28; 115 L Ed 2d 720 (1991) *reh den* 501 US 1277; 112 S Ct 28; 115 L Ed 2d 1110 (1991).

[29] "The fact that the states have formulated different sentencing schemes to punish felons is merely a reflection of our federal system which demands '[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement.'" *McMillan v Pennsylvania*, 477 US at 90 citing *Spencer v Texas*, 385 US 554, 566; 87 S Ct 648; 17 L Ed 2d 606 (1967).

emphasized uniformity to the exclusion of individualization, and at the cost of proportionality. While the indeterminate sentencing allows for greater discretion, it also results in different sentencing terms for similar situated defendants. Thus, Michigan's indeterminate sentencing system overlaid with legislative guidelines attempts to increase uniformity, proportionality and certainty while not preventing a trial court from exceeding the guidelines in those case where there are substantial and compelling reasons to sentence either above or below the guidelines.

Steven Chanenson, *The Next Era of Sentencing Reform*, 54 Emory L J 377 (2005) notes that the system in place in Pennsylvania and Michigan, while not perfect, may provide for the best alternative in the post-*Blakely* age. He calls for indeterminate sentencing with presumptive sentencing guidelines (that only cover the minimum sentence), that include discretionary parole release authority. He asserts that his model system, like Michigan's, would be "*Blakely*-compliant while still allowing for a balance of reasonable uniformity, reasonable proportionality, and at least a medium high score on the proportionality confidence index." *Id.*, at 24.

Mandatory minimum sentences would also be Sixth Amendment compliant in Michigan under *Blakely, Harris,* and *McMillan.* Mandatory minimums operate outside the Sixth Amendment jury trial requirement, because a defendant has fair warning of the potential punishment and amount of judicial discretion without additional factfinding by the trial court. Additionally, mandatory minimums do not relieve the prosecution from proving the elements necessary for a jury to find defendant guilty. Nor do mandatory minimums increase the statutory maximums available to the sentencing judge.

Consecutive sentences are also *Blakely* compliant. Both *Blakely* and *Apprendi* are concerned exclusively with facts going to the severity of the offense being considered by the jury. *Apprendi* noted that it was irrelevant for Sixth Amendment purposes that Apprendi could

have received more time through the use of consecutive sentencing (up to 20 years instead of the 12 years at issue). Kansas, the bellweather state for sentencing juries, gives discretion to the trial court to impose a consecutive sentence when the defendant is sentenced on two offenses on the same day. *State v Bramlett*, 41 P3d 796, 797 (Kan. 2002). The jury's verdict of two or more crimes authorizes the statutory maximum sentence for each offense. *California v Black, supra.* Michigan, since 1992, has limited a judge's discretion to sentence a defendant to consecutive sentences. MCL 768.7b.[30]

E. Defendant's Sentence Does Not Violate Blakely or Booker.

The defendant was provided with procedural due process at sentencing in this case. At sentencing, the defense challenged the scoring of three offense variables, OV 4, psychological injury; OV 8, victim asportation; and OV 10, exploitation of a vulnerable victim. Judge Tyner ruled for the defense regarding OV 8, finding that the variable should be scored zero. On offense variable, 4 and 10, Judge Tyner found that the variables were properly scored at 10 points and 15 points respectively. On appeal, defendant alleged that there was no evidence to support the scoring of these variables. The Court of Appeals determined that OV 4, and OV 10 were properly scored. The court looked to the presentence report and the Victim's Impact Statement which said:

> [L]ife has been terrible since the incidents. She states that she has a lot of nightmares, problems in her marriage, problems at work, and in just about every other facet of her life. She states that this whole situation has been a nightmare, and again has [a]ffected every area of her life. She indicates that she has not sought treatment as of this writing date, however, she plans to do so in the future. *Drohan* at 90.

[30] There are a limited number of exceptions such as felony firearm (mandatory consecutive) and first-degree home invasion (permissive) consecutive sentence.

The Court of Appeals determined that the victim's disrupted life, her nightmares, and her plans to seek treatment supported the ten-point score.

On the scoring of OV 10, the Court of Appeals looked to the words of the trial court:

> Vulnerability, clearly this victim, anyone who observed her demeanor on the stand would assess or attest to her vulnerability. She was what I would classify as readily susceptibility [sic] of a victim. To persuasion, to psychological injury based on her past. Accordingly, if I believe the defendant's story, she consistently went to the defendant with complaints about her marriage, the fact she couldn't handle it. All these factors are not conclusive but in this court's mind and based on all the testimony hear[d] in this trial, considering the 404-B conduct, considering the conduct the defendant exhibited toward the victim in this case, this is an extremely appropriate scoring. Predatory conduct is exactly how I would describe the defendant in this case. *Drohan*, at 90-91.

The Court of Appeals again had no difficulty affirming the 15 point score for OV 10. *Drohan, supra,* at 90-91. Defendant did not challenge the scoring of OV 12 in the trial court or in his appeal of right. This is not preserved, and in any event the reduction in score of 5 points would not have altered the scoring of the guidelines in defendant's offense variables. As noted above, the trial court has discretion to assign points to offense variables provided there is record evidence to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). MCL 777.34 provides that 10 points should be scored if there is psychological injury to a victim. Subsection 2 notes that the fact that a victim has not sought treatment is not conclusive. Predatory conduct is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Defendant chose his victims with skill and care, looking for personalities that he could take advantage of and then claim consensual conduct.

Application of *Blakely* is inappropriate to this matter. By its terms, *Blakely* does not apply to Michigan's indeterminate sentencing scheme. The statutory maximum is the maximum that the court may impose without any additional factfinding. The Michigan guidelines do not set any statutory maximum sentences. The sentencing judge may properly find facts that move the guideline range within the statutory maximum. The jury is the entity that authorized defendant's maximum sentence by finding him guilty of third degree criminal sexual conduct. Defendant received notice of the charges against him, and he had a jury trial, with the prosecution proving the elements of the crime beyond a reasonable doubt.

Defendant attempts to redefine the relevant statutory maximum from one statutorily defined by the legislature to one that is dependent upon presumptive guidelines. Instead of certainty and uniformity to similarly situated defendant's, defendant urges completely arbitrary sentences without minimal guidance. Alternatively, he argues that the Court should create hundreds of new crimes where the prosecution would have to plead and prove any fact that is in the guidelines that they believe the court should consider at sentencing. This ignores the plain language in a long string of Supreme Court cases from *Williams v New York, McMillan v Pennsylvania, Almendarez-Torres v United States, Jones v United States, Apprendi v New Jersey, Ring v Arizona, Harris v United States, Blakely v Washington,* and *United States v Booker*. No guideline factor increases the penalty for the crime defendant was facing beyond the statutory maximum that was submitted to the jury. Defendant's attempts to redefine the minimum term of incarceration as the statutory maximum cannot logically comport with the legislative requirement that the maximum sentence must be the statutory maximum. MCL 769.8(1). Defendant has not been exposed to a deprivation of his liberty greater than what was

authorized by the jury's verdict under the criminal sexual conduct statute. Nor did the judge impose upon the defendant a greater stigma than that accompanying the jury verdict. *Morton v Ohio*, 480 US 228; 107 S Ct 1098; 94 L Ed 2d 267 (1987).

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Thomas R. Grden, Assistant Prosecuting Attorney, respectfully requests this Honorable Court to affirm the decision of the Michigan Court of Appeals, denying the defendant resentencing because neither *Blakely* nor *Booker* apply to Michigan's indeterminate sentencing scheme.

Respectfully Submitted,

DAVID G. GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

JOYCE F. TODD
CHIEF, APPELLATE DIVISION

By: _____
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DATED: August 2, 2005